

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JULIUS CARTER ANDERSON,

Plaintiff,

No. CIV S-03-0817 MCE KJM P

vs.

W. HARTLEY, et al.,

Defendants.

ORDER

_____/

Plaintiff is a prisoner who is proceeding pro se and in forma pauperis. Plaintiff seeks relief under 42 U.S.C. § 1983.

On April 12, 2004, the court ordered, under 28 U.S.C. § 1915A(b), that plaintiff's complaint be served on defendants Hernandez and Hartley. Hernandez and Hartley were served and on September 1, 2004 filed a motion to dismiss. In response to the motion to dismiss, plaintiff filed a motion for leave to file an amended complaint and a proposed amended complaint.

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1 Under Federal Rule of Civil Procedure 15(a) a party may file an amended
2 complaint at any time before a responsive pleading is filed. Accordingly, defendants'
3 September 1 motion to dismiss will be denied and plaintiff's motion for leave to amend will be
4 granted. See Nolen v. Fitzharris, 450 F.2d 958, 958 (9th Cir. 1971) (motion to dismiss not a
5 "responsive pleading" under Rule 15(a)).

6 Defendants Hernandez and Hartley have filed a second motion to dismiss
7 plaintiff's amended complaint. The court will deny defendants' motion as the court must first
8 screen plaintiff's amended complaint.

9 Specifically, the court is required to screen complaints brought by prisoners
10 seeking relief against a governmental entity or officer or employee of a governmental entity
11 under 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the
12 prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon
13 which relief may be granted, or that seek monetary relief from a defendant who is immune from
14 such relief. 28 U.S.C. § 1915A(b)(1),(2).

15 After reviewing plaintiff's amended complaint, the court finds that the amended
16 complaint states Eighth Amendment claims against defendants Hernandez, Morrison and Pai,
17 and a First Amendment retaliation claim against defendant Pai. The other claims in the amended
18 complaint fail to state claims upon which relief can be granted.¹ Accordingly, the court will
19 order service of process on defendants Morrison and Pai,² but not on the other defendants
20 identified in plaintiff's amended complaint.

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22 ¹ Plaintiff asserts violations of rights arising under the Americans with Disabilities Act
23 (ADA). There are several problems with plaintiff's ADA claims; most notably, plaintiff fails to
24 allege that, because of a disability, he has been excluded from participation in, or denied the
benefits of services, programs, or activities of a public entity, or subjected to discrimination. See
42 U.S.C. § 12132.

25 ² As noted above, defendant Hernandez already has been served with process and has
26 appeared in this action. Plaintiff will be directed to serve him with the amended complaint, as
required by Federal Rule of Civil Procedure 5.

1 In accordance with the above, IT IS HEREBY ORDERED that:

2 1. The September 1, 2004 motion to dismiss brought by defendants Hernandez
3 and Hartley is denied without prejudice.

4 2. Plaintiff's September 17, 2004 motion for leave to file an amended complaint
5 is granted, and the amended complaint is deemed filed as of September 17, 2004.

6 3. The September 20, 2004 motion to dismiss brought by defendants Hernandez
7 and Hartley is denied without prejudice.

8 4. Service of plaintiff's amended complaint is appropriate for defendants
9 Morrison and Pai.

10 5. The Clerk of the Court shall send plaintiff two USM-285 forms, one summons,
11 an instruction sheet and a copy of the amended complaint filed September 17, 2004.

12 6. Within thirty days from the date of this order, plaintiff shall complete the
13 attached Notice of Submission of Documents and submit the following documents to the court:

14 a. The completed Notice of Submission of Documents;

15 b. One completed summons;

16 c. One completed USM-285 form for each defendant listed in number 4
17 above; and

18 d. Three copies of the endorsed amended complaint filed September 17,
19 2004.

20 7. Plaintiff need not attempt service on defendants Morrison and Pai and need not
21 request waiver of service. Upon receipt of the above-described documents, the court will direct
22 the United States Marshal to serve the above-named defendants under Federal Rule of Civil
23 Procedure 4 without payment of costs.

24 8. Plaintiff shall serve defendant Hernandez with the amended complaint as
25 required by Federal Rule of Civil Procedure 5.

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1 9. Defendant Hernandez need not take any action with respect to this matter until
2 informed to do so by the court.

3 DATED: September 30, 2005.

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6 UNITED STATES MAGISTRATE JUDGE
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NOTICE OF SUBMISSION
OF DOCUMENTS

_____/

Plaintiff hereby submits the following documents in compliance with the court's
order filed _____:

_____ completed summons form

_____ completed USM-285 forms

_____ copies of the _____
Amended Complaint

DATED:

Plaintiff